

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

MICHELLE ZACHARIAS,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

) Case No. DEMO-03-0016

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, BUSSE NUTLEY, Vice Chair, and GERALD L. MORGEN, Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on June 29, 2005.

1.2 **Appearances.** Appellant Michelle Zacharias was present and was represented by Michael Hanbey, Attorney at Law. M. B. Newbery, Assistant Attorney General, represented Respondent Department of Labor and Industries.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of demotion for neglect of duty, inefficiency, insubordination, and willful violation of the published employing agency or department of personnel rules or regulations for an ongoing pattern of unexcused absences, resulting in poor work performance.

II. FINDINGS OF FACT

2.1 Appellant was a Workers Compensation Adjudicator 3 and permanent employee for Respondent Department of Labor and Industries (L&I). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on July 10, 2003.

2.2 Appellant began her employment with L&I in approximately 1992 as a customer service representative. In 1994 Appellant began training as a Workers Compensation Adjudicator 2 and subsequently promoted to a Workers Compensation Adjudicator 3. Appellant's duties included the timely processing of injured workers' claims.

2.3 Appellant reported to Claims Unit Supervisor Joan Scofield from 1994 to 1997. In 1996, Ms. Scofield issued Appellant two letters of reprimand regarding attendance problems and the negative impact her absences had on the performance of her assigned job duties. Appellant's performance evaluation for the time period of September 1995 to November 1996 also reflected problems with attendance and punctuality, resulting in her co-workers and supervisor having to cover her work.

2.4 On March 18, 1997, Ms. Scofield issued Appellant a counseling memo in which she clearly stated that Appellant was not adhering to attendance or job performance expectations. Appellant's attendance records from December 1, 1996, through March 14, 1997, indicate she missed 172.4 hours of the 568 hours available for her to work. Ms. Scofield further noted that Appellant's co-workers had to take calls from Appellant's irate customers and handle Appellant's work to ensure the unit was not in violation of legislative mandates related to injured workers.

1 2.5 In 1997, Claims Unit Supervisor Richard Kelm became Appellant's supervisor. In
2 Appellant's performance evaluation for the time period of August 1997 to April 1998, Mr. Kelm
3 documented Appellant's attendance problems and attached Ms. Scofield's previous counseling
4 memo. Mr. Kelm also noted that Appellant had two "deemed reopened" claims that went past the
5 statutory time to make a decision.

6
7 2.6 Between May 2000 and January 2001, Mr. Kelm addressed Appellant's attendance and
8 performance problems as follows:

- 9 • On May 16, 2000, Mr. Kelm issued Appellant a memo regarding her performance
10 and attendance expectations, her inability to perform her assigned duties, the
11 significant burden on co-workers, and untimely services to customers.
- 12 • On July 5, 2000, Mr. Kelm issued Appellant a memo reiterating performance and
13 attendance expectations. Appellant had missed 100 hours of work that had not
14 been pre-approved since her May 16, 2000, counseling memo. Mr. Kelm also
15 stated that sick leave would only be granted if supported by medical certification
16 and vacation leave requests must have prior approval. Further, Appellant was
17 required to call her supervisor within one-half hour of the beginning of her work
18 shift, if unable to arrive to work on time, and submit leave slips by the end of the
19 business day upon her return from any absences.
- 20 • On July 21, 2000, Mr. Kelm issued Appellant a counseling memo for not following
21 his instructions concerning her absences as stated in the July 5, 2000, memo, and
22 he subsequently disapproved several of her leave requests. Once again, Mr. Kelm
23 stressed Appellant's unacceptable attendance and the negative impact on her
24 performance.
- 25 • On August 11, 2000, Mr. Kelm issued Appellant a letter of reprimand for
26 inappropriate conduct in the work place when Appellant loudly used profanity
toward him, including "fuck you"; "this is a bunch of fucking shit"; "fucking
bastard"; and "son of a bitch," after he asked if she had submitted leave for her
absence and reminded her he would not approve her absence without a medical
certificate.
- On August 16, 2000, Mr. Kelm received a letter from an injured worker regarding
Appellant's poor customer service and lack of responsiveness. He then pointed out
the customer's letter to Appellant as an example of how her absences impacted her
ability to perform her duties.

- On September 28, 2000, Mr. Kelm issued Appellant a counseling memo regarding attendance, job performance, and expectations. He also informed her that he would consider taking corrective action if there was not measurable improvement in her reliability and performance.
- On January 11, 2001, Mr. Kelm issued Appellant a letter of reprimand regarding her failure to improve attendance and job performance expectations since her last counseling memo in September 2000. Since that time, Appellant had been assessed with almost 100 hours in unpaid leave. In addition, a unit report on January 4, 2001 indicated Appellant had 87 phone messages to return, 83 of which had not been completed within the 48 hour guideline.

2.7 During February 2001 and the time period of March 16, 2001, through May 31, 2001, Appellant was on approved Family Medical Leave, and her absences were not the subject of any corrective action.

2.8 After returning to work, Appellant's attendance and job performance continued to decline. Between July and October 2001, Mr. Kelm issued Appellant one letter of reprimand for her late arrival to work and failure to call in within 30 minutes of the beginning of her work shift or provide medical certification; an email regarding 17 late phone calls; and an email directing her to take actions on claims and uncompleted work. In addition, Mr. Kelm met with Appellant on September 11, 2001, following up with a written memo on September 12, 2001, regarding her late arrival to work and her absence due to illness. At that time, Appellant explained that she had an appointment with a new doctor, and Mr. Kelm temporarily lifted the requirement to provide medical certification for medical leave until October 1, 2001.

2.9 From August 26, 2002, to approximately November 1, 2002, Appellant was placed on approved Family Medical Leave, and her absences were not the subject of any corrective action.

2.10 On December 5, 2002, Mr. Kelm sent a letter to Appellant notifying her that she had exhausted her Family Medical Leave. Mr. Kelm indicated he was willing to work with her on a

1 return to work plan or any reasonable accommodation that she needed. However, Mr. Kelm stated
2 he needed information from Appellant's doctor regarding her ability to work as a claims manager
3 by no later than December 13, 2002.

4
5 2.11 On December 31, 2002, Appellant met with Sandra Riggle, Human Resource Consultant,
6 and Maura Quiggle, Family Medical Leave Act (FMLA) administrator, to request a six-month leave
7 of absence. Appellant's request for a continued leave of absence was forwarded to management for
8 consideration. Because the medical documentation presented by Appellant did not provide a
9 sufficient basis for a continued leave of absence, the department arranged for Appellant to attend an
10 Independent Medical Examination (IME).

11
12 2.12 On February 18, 2003, Appellant attended the IME and a report was forwarded to the
13 department. The IME indicated that a leave of absence was unnecessary and nothing prevented
14 Appellant from returning to work.

15
16 2.13 On April 3, 2003, Georgia Moran, Program Manager for Claims Administration, sent
17 Appellant a letter informing her that the results of the IME indicated that a leave of absence would
18 not facilitate her ultimate return to work. Ms. Moran denied Appellant's six-month leave of
19 absence, and directed her to return to work on April 9, 2003.

20
21 2.14 Appellant failed to report to work on April 9, 2003, as directed, and failed to notify her
22 supervisor that she would be absent. Instead, Appellant delivered a letter to the Human Resources
23 Department on April 9, 2003, requesting reasonable accommodation and outlining specific requests,
24 including working from home.

1 2.15 By letter dated April 25, 2003, Ms. Quiggle responded to Appellant's request for reasonable
2 accommodation by stating that the IME indicated she was in fact able to return to work and that any
3 further arrangements or accommodations would need to be supported by the appropriate medical
4 documentation. Appellant did not provide the agency with any further medical documentation to
5 support her request.

6
7 2.16 The department held Appellant's position open until May 19, 2003. Appellant, however,
8 failed to report to work or notify her supervisor of her absences from April 9, 2003, through May
9 19, 2003. Appellant was charged with eight hours of unauthorized leave without pay for each of
10 those days, totaling 232 hours of unauthorized leave without pay.

11
12 2.17 Robert Malooly, Assistant Director for Insurance Services and Appellant's appointing
13 authority, notified Appellant of the charges related to her absences. On June 3, 2003, Mr. Malooly
14 met with Appellant and her attorney for a predetermination meeting to allow Appellant the
15 opportunity to respond to the charges. Appellant responded to the charges by referring to her April
16 9, 2003, letter, but she failed to provide any supporting medical documentation.

17
18 2.18 Mr. Malooly first became aware of Appellant's request for reasonable accommodation at her
19 predetermination meeting. Mr. Malooly reviewed Appellant's specific requests and consulted with
20 the Human Resources Department to determine if anything could be done to support her requests.
21 Mr. Malooly also reviewed Ms. Quiggle's April 25, 2003, response to Appellant, in which Ms.
22 Quiggle stated that there were technology and business related reasons that prohibited Workers
23 Compensation Adjudicators from working from a remote site. Mr. Malooly concluded that
24 Appellant's requests were not feasible for the department. Furthermore, he found Ms. Quiggle's
25 response clearly put Appellant on notice that additional medical documentation was necessary to
26 support her requests.

1
2 2.19 In determining the level of discipline, Mr. Malooly considered Appellant's personnel file,
3 including the positive aspects of her past performance, as well as her extensive history of failing to
4 report to work, resulting in deficient performance. Mr. Malooly determined that previous
5 counseling attempts had been unsuccessful and that Appellant continued to be absent from work,
6 violating L&I's Administrative Policy 3.50, which states that "[e]mployees are responsible for
7 requesting and reporting leave" in accordance with WAC 356-18-070, requiring employees to
8 report sick leave at the beginning of an absence and in compliance with agency procedures. In
9 addition, Mr. Malooly considered the negative impact Appellant's actions had on her ability to
10 assist her customers and the unnecessary burden her absences placed on her work unit. Mr.
11 Malooly concluded Appellant could not remain in a position that required prompt action affecting
12 the critical well being of injured workers. Therefore, Mr. Malooly determined demotion was the
13 appropriate disciplinary sanction.

14
15 2.20 By letter dated June 30, 2003, Mr. Malooly notified Appellant that she was being demoted
16 from a Workers Compensation Adjudicator 3 to an Industrial Insurance Underwriter 1, effective
17 July 16, 2003. Mr. Malooly charged Appellant with neglect of duty, inefficiency, insubordination,
18 and willful violation of L&I Administrative Policy 3.50, Leave, WAC 356-18-070, Sick leave-
19 Reporting-Payment, and the Collective Bargaining Agreement, Article 24.8.

20 21 **III. ARGUMENTS OF THE PARTIES**

22 3.1 Respondent argues Appellant neglected her duty when she failed to report to work and
23 perform her assigned job duties. Respondent asserts Appellant's excessive absenteeism affected her
24 ability to satisfactorily perform her duties and resulted in performance deficiencies, causing
25 additional work for her co-workers and a lack of responsiveness to the injured workers who were
26 her customers. As a result, Respondent contends Appellant was inefficient in processing the claims

1 on her caseload and failed to complete tasks in a timely manner. Respondent argues Appellant was
2 insubordinate when she failed to follow her supervisors' expectations and directions regarding
3 absences, as well as the Program Manager's directive to return to work on April 9, 2003. Further,
4 Respondent argues Appellant violated agency policy when she failed to properly request and report
5 leave in accordance with the rules. Respondent asserts Appellant exhibited a pattern of poor
6 attendance and contends her supervisors' attempts to corrective her behavior were unsuccessful.
7 Therefore, Respondent argues demotion is appropriate.

8
9 3.2 Appellant does not dispute that she has missed a lot of work. However, Appellant argues
10 she suffers from various medical conditions, including previous job injuries, that affect her ability
11 to perform the duties of her position. Appellant asserts the agency failed to recognize that she has
12 chronic medical conditions that require reasonable accommodation. Appellant asserts the agency
13 failed to consider her requests for accommodation as outlined in her April 9, 2003 letter, including a
14 transfer to another work unit and working from home. Appellant contends the agency is aware of
15 her ongoing medical conditions because she was granted Family Medical Leave on previous
16 occasions. Appellant argues the agency is relying on the results of an IME and not the
17 recommendation of her own medical doctor, who she asserts does not agree that she is able to return
18 to work. Appellant argues the agency has not made a reasonable attempt to accommodate her and
19 asserts there is no basis for her demotion.

20 21 **IV. CONCLUSIONS OF LAW**

22 4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.

23
24 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
25 the charges upon which the action was initiated by proving by a preponderance of the credible
26 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the

1 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
2 Corrections, PAB No. D82-084 (1983).

3
4 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
5 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
6 of Social & Health Services, PAB No. D86-119 (1987).

7
8 4.4 Respondent has proven by a preponderance of the credible evidence that Appellant
9 neglected her duty to report to work and contact her supervisor at the beginning of her work shift to
10 report her absences from April 9, 2003, to May 19, 2003. The department clearly informed
11 Appellant that her Family Medical Leave had been exhausted, her request for a six-month extension
12 in leave was denied, and that an IME did not support Appellant's request for additional leave.
13 Furthermore, the Claims Administration's program manger clearly directed Appellant to report to
14 work on April 9, 2003. Despite the department's numerous attempts to counsel Appellant on poor
15 attendance and leave reporting, she failed to report to work and failed to complete the assigned
16 duties of her claims adjudicator position, creating a significant burden on her work unit and
17 resulting in unsatisfactory customer service.

18
19 4.5 Inefficiency is the utilization of time and resources in an unproductive manner, the
20 ineffective use of time and resources, the wasteful use of time, energy, or materials, or the lack of
21 effective operations as measured by a comparison of production with use of resources, using some
22 objective criteria. Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal*
23 *dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997).

24
25 4.6 Respondent has proven that Appellant was inefficient and unproductive as a result of her
26 continual attendance problems.

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2 4.7 Insubordination is the refusal to comply with a lawful order or directive given by a superior
3 and is defined as not submitting to authority, willful disrespect, or disobedience. Countryman v.
4 Dep't of Social & Health Services, PAB No. D94-025 (1995).

5
6 4.8 Respondent has proven that Appellant was insubordinate when she failed to follow the
7 directives of her superiors to report to work and follow proper procedures regarding leave requests.

8
9 4.9 Willful violation of published employing agency or institution or Personnel Resources
10 Board rules or regulations is established by facts showing the existence and publication of the rules
11 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
12 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

13
14 4.10 Respondent has proven that Appellant violated the agency's leave policy when she failed to
15 report her absences at the beginning of her work shift, resulting in unauthorized leave without pay
16 for the time period of April 9, 2003, through May 19, 2003.

17
18 4.11 Appellant raises the issue of reasonable accommodation and claims that Respondent failed
19 to accommodate her medical conditions. In this case, Appellant attended an IME, and the results of
20 the IME indicated Appellant was able to return to work and perform the duties of her position.
21 Although Appellant claims that reporting to work was against her doctor's orders, Appellant
22 provided no medical documentation to support she had a disability that prevented her from
23 performing the essential duties of her position with or without accommodation. Appellant's refusal
24 to return to work was unreasonable under the circumstances, and her actions were not mitigated.

1 4.12 Under the facts and circumstances of this case, we conclude that Respondent has proven
2 Appellant's demotion was warranted, and the appeal of Michelle Zacharias should be denied.
3

4 **V. ORDER**

5 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Michelle Zacharias is denied.
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7 DATED this _____ day of _____, 2005.
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9 WASHINGTON STATE PERSONNEL APPEALS BOARD
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12 _____
Busse Nutley, Vice Chair
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Gerald L. Morgen, Member
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